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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1547

MICHAEL CATALANO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Michael Catalano, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 21, 1974.

One of Petitioners Co-Defendants, Aniello Dellacroce, shortly prior to March 22, 1974 filed with this Court a Petition for a Writ of Certiorari to review the said judgment of the Court of Appeals for the Second Circuit.

To avoid duplication and conserve the time of this Court Petitioner Catalano respectfully requests the Court to permit him to incorporate by reference and adoption the Petition of the said Dellacroce and the Appendix thereto.

Opinion Below

The opinion of the Court of Appeals is not yet reported but is reprinted in the Appendix A to the Dellacroce Petition.

Jurisdiction

A judgment of conviction was entered against Petitioner Catalano in the United States District Court for the Southern District of New York on May 14, 1973 after a trial before Honorable Arnold Bauman and a jury and after an evidentiary hearing in aid of a motion of Defendant Goldman for a new trial under Rule 33 of the Federal Rules of Criminal Procedure in which motion Defendant-appellant Catalano joined. Hon. Judge Bauman sentenced Defendant-appellant Catalano to two years in prison to follow a sentence which he was then serving.

The Indictment filed May 2, 1972 had three counts. Count One charged that the three Defendants Aniello Dellacroce, Martin Goldman and Michael Catalano conspired to evade income taxes owed by Defendant Dellacroce for the year 1968. Counts Two and Three charged only Defendant Dellacroce with income tax evasion and the filing of a false return for the year 1968.

The trial began January 3, 1973 and on January 24 a verdict of guilty was returned as to each defendant on all counts. On April 2, 1973, Defendant Dellacroce was sentenced to five years imprisonment.

On March 14, 1973 the Motion for a New Trial was filed. An evidentiary hearing was held May 3, 4, 7 and 8, 1973 at the conclusion of which the motion was denied. Defendant Dellacroce having previously been sentenced was not a party to the motion nor did he participate in the hearing. All three defendants appealed to the Court

of Appeals for the Second Circuit. The appeals were heard and decided together.

The situation of the three appeals was not identical. The appeals of Appellants Goldman and Catalano included an appeal from the denial of the Motion for a New Trial of March 14, 1973.

On January 21, 1974 the Court of Appeals for the Second Circuit affirmed petitioner's conviction.

Questions Presented

Reference is made to the Petition of Dellacroce as to the questions presented.

It is Petitioner Catalano's position that he is entitled to rely on all of the matters in the Dellacroce Petition and secure the benefit of any review by this Court related thereto. In addition, there is the following additional question so far as Petitioner Catalano is concerned.

A. Whether the prosecutorial misconduct with respect to prosecution witness Stone disclosed at the post verdict evidentiary hearing on the motion for a new trial mandated a new trial.

Constitutional Provisions Involved

There is incorporated herein by reference material under this heading in the Dellacroce Petition.

Statutes Involved

There is incorporated herein by reference material under this heading in the Dellacroce Petition.

Statement of Facts

Petitioner Catalano refers to and adopts the Statement of Facts which is set forth in Petitioner Dellacroce's Petition.

In addition Petitioner Catalano has above referred to the Motion for a New Trial in which Petitioner Dellacroce did not participate.

This Motion was based on information received subsequent to the jury verdict showing conclusively that a prosecution witness, William Stone, was in the employ of the Government, and was being paid to assist the prosecution. This information was not disclosed at the time Stone testified at the Trial in Chief.

Petitioner respectfully calls the Court's attention to the following highlights supported by the minutes of the evidentiary hearing:

Hon. Judge Bauman repeatedly throughout the evidentiary hearing stated that the purpose of the hearing was to determine whether the witness William Stone testified truthfully at the Trial in Chief (Appendix 1a-2a).

This was a complete distortion of the purpose of the hearing. The purpose of the hearing was to determine whether the witness Stone's relation with the Government was such that it should have been disclosed to the defense at the time of the Trial.

It is unequivocal that at the time of the Trial the Witness was being paid on a monthly basis, referred to as "subsistence" for the purpose of dignifying the payment (Appendix 2a).

Although Hon. Judge Bauman at the Trial in Chief had cut off Defense Counsel's questioning of the Witness,

His Honor attempted to penalize the Appellants for the fact their counsel had not brought out Witness Stone's situation on cross-examination (Appendix 3a).

There is no doubt that the Witness Stone had been paid money by the Government and been promised more, and that as far as he was concerned these payments and promises were for his testimony before the Grand Jury which returned the Indictment in this case and at the trial (Appendix 4a).

The Government's attempt to attribute these payments to services in other cases which they admitted were worthless, was a sorry effort to bolster up a sordid page in Government prosecution (Appendix 5a, 6a).

Hon. Judge Bauman's attitude toward prosecutorial disclosure is best illustrated by his statement (Appendix 7a, 8a).

". . . I suppose the next contention will be that it was a requirement that the United States Attorney or the attorney for the United States Government deliver to counsel for the defense a proposed cross-examination witness sheet based upon what he knows. . . ."

It is significant that there were tape recordings of conversations between government prosecution staff and the Witness Stone.

The Court of Appeals in its opinion relating to the claim that there should have been a disclosure of the Government's payments to Stone (Appendix A. 13 to Petition of Dellacroce) disposed of the tape matter in the following cavalier manner:

> "It would serve no purpose to set out the contents of the tapes. It is sufficient to say that the judge below found there was no merit in Goldman's claims and that such a finding is not unwholly supported by the evidence. * * * "

Reasons for Granting the Writ

Petitioner Catalano refers to and adopts all of the reasons set forth in the Petition of Dellacroce.

In addition to those reasons Petitioner Catalano respectfully submits that the Government failed in its obligation to disclose that the prosecution Witness Stone was in the employ of the Government and had been promised payment for his testimony.

The tapes of conversations between Stone and the prosecution showed this conclusively in the considered opinion of the Petitioner and his counsel.

The truth or falsity of the testimony of the Witness Stone is besides the point.

Petitioner submits that the *Giglio* case in this Court 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) is clear and dispositive of this matter.

The Court of Appeals for the Second Circuit in the *Mele* case, 462 F.2d 918 (CCA 2, 1972) followed the *Giglio* precepts and in that case in a very strong and well reasoned opinion by Hon. Judge Clark, a retired Justice of this Court it is clearly stated (p. 926):

> "* * * The very least required of the Government was a complete disclosure of the truth to the district court in camera so that the balance of interest could be struck by one not involved in the all too often competitive enterprise of prosecution."

CONCLUSION

For the reasons above set forth, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

(62)

The Court: What are they?

Mr. Hurwitz: There have been statements made that Stone was put in protective custody sometime in October of 1971, after his appearance in the grand jury and I am just trying to inquire.

The Court: You made the statement.

Mr. Hurwitz: I think Mr. Aronwald——

Mr. Shaw: I think it was in some kind of protective custody the relatively early part of October but this seems irrelevant.

The Court: Let me ask both sides to straighten it out with respect to this. I believe we are here to find out basically whether or not Mr. Stone lied when he was on the witness stand during the trial. Let us start with that. Is that correct?

Mr. Hurwitz: That is one of the considerations, your Honor.

The Court: What else am I here to determine?

Mr. Hurwitz: I suggest and so argued that in conjunction with whether or not Mr. Stone lied, he has said he lied in the tapes and we are here to inquire whether the Government should have disclosed to the defense that promises of money were made to Stone for his testifying in the grand jury and as to that I submitted a memorandum of law and (63) honestly——

The Court: Let us take it bit by bit. Could I ask you to state, Mr. Shaw, first of all I understand my basic problem is to see whether or not Mr. Stone lied during his testimony here.

Now, let us go on to phase 2. I don't find this as a fact at all, supposing the Government gave him money to induce his testimony in the grand jury, supposing, and I do not find this at all, he went into the grand jury and testified truthfully. The matter of the Government having given money obviously would have been a proper area for cross-

examining him as to his interest as a witness and the circumstances under which he may have given his testimony. But beyond that where does it go unless Mr. Stone lied.

Mr. Hurwitz: You want me to respond?

The Court: Yes, I invite it.

Mr. Hurwitz: You are leaving aside, and I pose this to your Honor as I think the case law backs me up on this, leaving aside the question of whether or not Stone perjured himself at trial, I read the cases to say that the Government should have disclosed and indeed in this case should have disclosed to defense counsel and I assume as your Honor that for the argument that a promise of money was given to Stone for testimony in the grand jury.

* * * * *

(509)

Q. Was your rough idea reasonably accurate? A. I still don't know. I assume he received subsistence monies, it would be approximately $1,000 a month, covering his rent and food and that would be it.

Q. At the time of the trial did you know that he had received several hundred dollars from either the United States Attorney's office or the Department of Justice or the marshals in Miami? A. No. I knew he received some monies as a result of information he had given. I did not know how much money he received up to that point.

I knew that was a bone of contention, one of Mr. Stone's disputes, that he had not received the amount of money that he was supposed to have received.

Q. But you are now talking about monies that he got from IRS? A. Those are the only monies I am aware Mr. Stone has received.

Q. I don't recall, you may have been here yesterday when somebody testified that the Department of Justice or the marshal's office in Florida gave Mr. Stone $600 or more of expense money.

Colloquy

The Court: Over a period of time.

Q. Were you aware of that?

* * * * *

(163)

Secondly, were any promises made to witnesses.

I think those are two questions that your Honor will have to make a finding on in resolving this hearing.

Third, did the United States Attorney's Office know of these payments or promises; and,

Four, whether they disclosed the fact of payments or promises to the defense. I think those are the four.

The Court: It is perfectly obvious to me as trial judge they didn't disclose them but it is equally obvious to me defense counsel could have asked about it when this man was on the stand during the trial. They knew he was in protective custody, a stool pigeon, to use the indelicate expression and very often they are in hopes of having a lesser sentence or hope of dropping his case or for money. Now, it is an elementary aspect of cross-examination, sir, and I am sure you know it, when you got somebody like that on the stand to ask him what is in it for you.

Now, counsel elected, and I don't criticize the election at all, but counsel elected not to do that.

Mr. Handman: But the election if such was made, was made without the knowledge on the part——

The Court: You are suggesting a point of law, Mr. Handman, that whenever any supporting payments or payments of any kind are made to any Government witness, the Government * * *

* * * * *

(203)

Q. You are quite certain of that? A. I have said so.

Q. Did you state in that letter, sir, that a meeting during the month of September, 1971, at a New York City motel where a Mr. Bonomi, Mr. DiBella, Mr. Carpiniello and Mr. Fratolillio were present, did you state in that letter at that meeting Mr. Carpiniello advised Mr. Bonomi that you had important testimony in connection with the Dellacroce case? Did you state that? A. Yes, I did.

Q. Did you also state that before you would testify before a grand jury and subsequently the trial proceeding—

Mr. Shaw: I object to this proceeding, your Honor. The letter is in evidence. Can't we save time?

The Court: I will permit it.

Q. Did you state in that letter, sir, that before you would testify in the grand jury and subsequently the trial proceedings, that you insisted upon a monetary award, namely, $1,000 in advance against the tax cases you would turn over to IRS? A. Yes, the tax cases, yes.

Q. Did you state that before you would testify in the grand jury and subsequently the trial proceedings in Dellacroce, that you would insist upon a monetary award? (204) A. Yes, I did.

Q. Did you also state in that letter that Bonomi advised you he could not pay for testifying before the grand jury but he would give you lead money on the cases that you would give to his department? A. Yes, Mr. Hurwitz, yes.

The Court: I believe we will take our luncheon recess now. Return at 2 o'clock promptly, please.

Mr. Shaw: Your Honor, may I ask as a request, I have something before a judge at 2:15. May Mr. Aronwald replace me? It should only be 20 minutes.

The Court: Yes. 2 o'clock promptly, please.

(Luncheon recess taken until 2 p.m.)

* * * * *

(398)

Mr. Aronwald: Before Mr. Handman begins, Mr. Bonomi when he left had been directed by the Court to furnish certain information to the Court involving some check stubs relating to payment to Mr. Stone and also a ledger sheet. Your Honor indicated Xerox copies would suffice.

I would ask that the check stub sheet with the stubs on it and the ledger sheet on it be marked as the next government exhibit in order in evidence.

The Court: They will be so marked. I will look at them in the next recess, Mr. Aronwald, and if they should be turned over I will turn them over. Go ahead, Mr. Handman.

By Mr. Handman:

Q. A few minutes ago, Mr. Carpiniello, you said in answer to one of Mr. Hurwitz's questions that information regarding the Brooklyn cases did not pan out the way it was expected. I think that was your phrase. Is that true, that the Brooklyn cases information from Mr. Stone did not pan out as expected? A. The information that Mr. Stone said he had concerning the Brooklyn cases was not what the investigation determined.

What I am trying to say when the intelligence data that Mr. Stone gave at the August 6 meeting was evaluated, it was not what he said it was.

(399)

Q. In other words, I take it it had less value than Mr. Stone had built it up to have? A. That is correct.

Q. When did you find that out? A. It was an ongoing thing, following the meeting with Mr. Bonomi, the August 6 meeting.

Q. Then Mr. Stone handed over a lot of material to the Brooklyn people? A. I believe the next day a Brooklyn

agent went to Mr. Stone's house and did obtain various documents and records. Your question was when did I find out?

Q. Then you must have had some feed-back that the stuff was not so valuable? A. I was getting this from Mr. Bonomi, exactly when I don't know. I would say within three weeks, maybe two weeks after that August 6 date that Mr. Bonomi said it was not exactly what he said.

Q. In other words, three weeks or so after August 6, 1971 was the date of that meeting, you found out that the Brooklyn material was not so valuable.

Did you ever get after that any further feedback on that Brooklyn matter that it was either less valuable or more valuable? A. I did. There was a meeting on this, discussion (400) with myself and Mr. Bonomi after that first occasion. Yes, the answer is yes.

Q. So that the information tended to be more or less the same, that it just didn't pan out? A. It wasn't what he said, yes.

Q. As far as you know no indictments were handed down based on this Brooklyn information?

Mr. Aronwald: I object, going over the same ground previously.

The Court: Sustained.

Q. Now, the largest payment made to Mr. Stone was $2,000, which came in October of 1972, is this right? A. I believe so.

Q. That was over a year after you found out that the Brooklyn information didn't pan out, is that right?

Mr. Aronwald: I object to counsel referring to it as pan out. That was not the testimony.

Mr. Handman: Yes, it is that exactly.

The Court: Gentlemen, please.

Mr. Aronwald: I believe the witness' testimony had been that the information supplied by Mr. Stone did not prove to be as valuable as Mr. Stone thought it would be.

The Court: He said it wasn't. Just let me see. The information in the Brooklyn cases wasn't as valuable as * * *

* * * * *

(164) * * *

Mr. Handman: Well, your Honor, what I suggest there is what the Supreme Court stated recently in the Giglio case and I quote on Page 4 of the decision, when the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within this general rule.

And by that they mean the general rule under Brady of disclosure and I might point out further that the Giglio case was recently cited with approval by the Second Circuit in this Mele case in which they overturned the district court on a similar basis.

So I would hate to be here thinking that I am trying to prove that Mr. Stone is a liar because I think that is obvious from everything that transpired so far and I don't think your Honor is called upon to question the credibility of the witness. But if the jury knew that this witness had received $3,800 or $4,000, would that have been a factor in there——

The Court: All that would have taken was one question. All that would have taken was one question on cross-examination.

I suppose the next contention will be that it was (165) a requirement that the United States Attorney or the attorney for the United States Government deliver to counsel for the defense a proposed cross-examination witness sheet

based upon what he knows. I think that is the next step in the progression that you are asking me about.

I have your point. Do you want to say something?

Mr. Hurwitz: The only thing, and I menitoned it to your Honor and I don't think it bears repetition, but I would say in addition to the point of Mr. Handman——

The Court: You, Mr. Hurwitz, are an experienced lawyer and you know exactly what I am talking about and I understand you differ with me. I understand you contend it was the obligation of Mr. Aronwald to say the man had gotten $3,800 or whatever it is.

Mr. Hurwitz: That is not my point. My point in addition to that, and let me state it, I think Mr. Aronwald was under an obligation at the trial to tell counsel that this man had been promised money for his testimony. I am not talking——

The Court: That hasn't been established.

Mr. Hurwitz: But that is the obligation that——

The Court: I understand that is heavily denied so far.

Mr. Hurwitz: That has been heavily denied but * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1547

MICHAEL CATALANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having unlawfully conspired with Aniello Dellacroce and Martin Goldman to attempt to evade Dellacroce's 1968 federal income tax, in violation of 18 U.S.C. 371. Petitioner was sentenced to two years' imprisonment. The court of appeals affirmed.[1] Petitioner contends that the government

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[1]The opinion of the court of appeals is set forth in the appendix to the petition for a writ of certiorari in No. 73-1420, *Dellacroce* v. *United States*, and is reported at 491 F. 2d 268. The judgment of the court of appeals was entered on January 21, 1974; the petition in the instant case was not filed until April 13, 1974, and therefore is substantially out of time under Rule 22 (2) of the Rules of this Court.

failed to disclose at trial that a prosecution witness, William Stone, "had been promised payment for his testimony" (Pet. 6).[2]

Petitioner's contention was the subject of a four-day post-trial hearing on a motion for new trial. At the conclusion of that hearing the trial court determined that there was "not one iota" of evidence that Stone had been promised payment for his testimony (H. 563-565).[3] This determination was upheld by the court of appeals as supported by the evidence (491 F. 2d at 276), and it warrants no further review. See *United States* v. *Johnson*, 327 U.S. 106. There is, therefore, no factual basis for petitioner's contention.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

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[2]Petitioner also incorporates by reference all contentions made by petitioner Dellacroce in No. 73-1420. Those contentions, some of which petitoner here lacks standing to raise, are answered in our opposition to Dellacroce's petition, a copy of which we are sending to petitioner's counsel.

[3]"H." refers to the transcript of the post-trial hearing.